No. 82-105

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1982

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

Appellants,

v.

MAURICE JOHN KEENAN,

Appellee.

On Appeal from the Supreme Court of California

# REPLY BRIEF OPPOSIING MOTION TO DISMISS

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## INTRODUCTION

To paraphrase, yet disagree with appellee, simply stated this appeal does not concern a dispute about whether or not appellee should have a second lawyer appointed to represent him (Motion to Dismiss at p. 2). We would not waste our own, much less this Court's time, by arguing about the need for a second lawyer in this case. Because if that were the only issue, we can assure this Court we would not be here. What this appeal does concern is the constitutionality of a procedure granting criminal defendants the unfettered right to move, ex parte, for the appointment of a second counsel, following which any judicial record on the motion is deemed "confidential."

In light of the tack taken by appellee, and particularly his claim of

"harassment" (Motion to Dismiss at p. 5), we remind this Court that the People did not file an ex parte motion in this case, taking it through the State trial, appellate, and supreme courts without providing notice or the opportunity for opposition to be heard. Nor did the People ever ask that judicial records in this case be sealed from public viewing. The grounds for this appeal are based on issues created by appellee, not the prosecution. Terms like "in camera" and "confidential" have not been imagined by the People; they have been memorialized in the Official Reports of the California Supreme Court.

We agree completely that the word "secret" has negative connotations, especially in a judicial system premised on openness, and bound by the First Amendment's right of free discussion of

governmental affairs. But, if secrecy in criminal proceedings be anathema, we need only look at the facts, newly disclosed by appellee, to see the troubling problems stemming from the ruling in this case: on July 29, 1982, a hearing was held (briefly according to appellee) ex parte and in chambers on the matter of the appointment of a second counsel (Motion to Dismiss at p. 2).[1] Are ex parte hearings in criminal cases, without notice to or contest by the opposition, to become ordinary, acceptable procedures before the court issues a decision in public session?

This Court should not be misled by appellee's attempt to minimize the

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1. That appellee has chosen to reveal these facts does not detract from their being done in the first place. Other ex parte proceedings need not be so disclosed. Besides, the contents of the ex parte hearing have not been revealed.

significance of a ruling which permits criminal defense counsel an opening wedge through the back door into a court's chambers, without notice to the prosecution, without opportunity for opposition, and without public review because records are to be sealed under a cloak of confidentiality. One would expect defendant to set forth reasons for having such an ex parte hearing, but appellee wholly fails to provide any. Instead, he seeks to insulate the challenged procedures by claims of (1) mootness, (2) lack of substantiality, and (3) adequacy of independent state grounds to support them. These defenses, however, as as lacking as the grounds for the challenged procedure.

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I

THIS CASE IS NOT MOOT BECAUSE COUNSEL HAS BEEN APPOINTED, OR BECAUSE THE PEOPLE DID NOT TRY TO DELAY THIS CASE FURTHER BY REQUESTING A STAY

Last term, in a case which appellants otherwise rely upon as forbidding the mandatory closure of criminal trial proceedings, this Court re-affirmed the rule that constitutional challenges to such closure orders are not rendered moot because a criminal trial has ended. If the underlying dispute between the parties is capable of repetition, yet evading review, it nevertheless presents a live controversy. Globe Newspaper Co. v. Superior Court, ___ U.S. ___, 73 L.Ed.2d 248, 254 (1982). This principle has also been applied to a challenge against the closure of a pretrial hearing in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546 (1976) The controversy in this case is obviously capable

of repetition yet evading review, not only because of the typically short duration of criminal trials, but also because the ex parte proceedings at issue, by their very nature, are specifically intended to evade public scrutiny, and hence, review.

Nor should consideration of the ruling here be defeated by the People's decision not to seek a stay of trial. This case has been pending trial since October of 1979, having been delayed until now by appellee's various pretrial motions relating to his court-appointed counsel. Clearly, it is not in the People's interest to prolong this proceeding any more than absolutely necessary. Mr. Keenan, having gained this long a reprieve, should not be permitted to trade his speedy trial rights (U.S. Const., Amend. VI) for a claim of mootness.

## II

## THE ISSUES IN THIS CASE RAISE SUBSTANTIAL FEDERAL QUESTIONS

Appellee charges that only an "incorrect and tortured reading" of the California Supreme Court's opinion leads us to conclude that the appointment of counsel will not be done in open court. Of course, this charge overlooks, and thus fails to address, the questions presented of whether a defense motion for second counsel can be made ex parte, in a confidential proceeding, with the record then sealed from public view, without offending the public's right to know about and discuss judicial proceedings, and their due process rights of notice and an opportunity to be heard on the defense request. Yet, even assuming, as appellee does, that the appointment will be made in open court, we again ask: What is the justification

for making the motion in camera on an ex parte basis? Why the prior restraint on the public learning that the motion has been made?

We do not believe, however, that any torturing of language is needed to reach the conclusion that by its ruling in this case the California Supreme Court has sanctioned the secret appointment of criminal defense counsel. California Penal Code section 987.9 has been construed by the Court below to apply, by analogy, to the making and hearing of a defense request for additional counsel. Keenan v. Superior Court, 31 Cal.3d 243, 250, 180 Cal.Rptr. 489, 492-493, 640 P.2d 108, 111-112. This statute provides that rulings on the reasonableness of defense investigative requests shall be made at in camera hearings. Because section 987.9 requires confidentiality, the

California Supreme Court ordered that appellee's request for second counsel be maintained in confidence and that the record remain confidential. 31 Cal.3d at p. 247, fn. 5, 180 Cal.Rptr. at 491, fn. 5, 640 P.2d at 110, fn. 5. Since the ruling on the defense requests for additional counsel would be made at in camera hearings, with the record to remain confidential, it should follow that the appointment of counsel would be accomplished in secrecy.[2/]

The issue of where and when the appointment of counsel actually occurs, however, has not been our primary focus. For it can be just as important to know that additional counsel was <u>not</u> appointed by the court. It is this

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2. Indeed in this case the denials of appellee's requests for second counsel were accomplished <u>ex parte</u> before the State trial and appellate courts.

ruling which is much more likely to engender later appellate court challenge, and about which the public undoubtedly has a right to know. The more significant fact, therefore, is that the request for counsel has been made. It is this motion which the California Supreme Court has permitted to be made in camera. It is the ex parte hearing on the motion, without first establishing a need for such, or affording the prosecution an opportunity to be heard, which we submit is constitutionally suspect.

Appellee cites but one appellate court decision, Marshall v. United States, 423 F.2d 1315 (10th Cir. 1970) in support for the statement that a showing on the need to hire experts, investigators and others can be ex parte under the authority of 18 U.S.C. § 3006A(e). Marshall does not assist appellee, however, since

this decision expressly recognizes the distinction between the appointment of counsel for federally prosecuted indigents under 18 U.S.C. § 3006A(b) and the service of others than counsel under subsection (e). 423 F.2d at 1317. The former subsection "contemplates 'appropriate inquiry' by the court as to defendant's claimed need[.]", whereas the latter "requires an ex parte proceeding to test the necessity of 'investigative, expert, or other, services' . . . ." Ibid. Marshall hardly permits an ex parte motion for or hearing on the need for counsel.

Although appellee claims confusion about our position on the nature of any hearing (Motion to Dismiss at p. 3), the matter can be restated in plain language. Motions for appointment of counsel must be made in open court

with notice to the prosecution, and allowing for the opportunity to be heard. If a Fifth Amendment claim of privilege is asserted by the defendant, this portion of the hearing can be held in camera, with the trial court then stating its ruling, including the basis therefore, in open court. As the matter now stands, the mere making of a motion is deemed to be privileged without any justification whatsoever, and the record is then sealed.

We think it telling that appellee has chosen one single aspect of the questions presented in the Jurisdictional Statement to which he attempts a response. He fails to address the major issue, that of the public's rights under the First Amendment to know about and to discuss judicial proceedings. No effort has been made to give reasons for allowing defense

motions to be made and then heard ex parte. Appellee utterly fails to justify the decision below with the constitutional requirement that criminal trials be open to the public, and the public's presumptive right of access to judicial records.

III

THERE IS NO ADEQUATE AND INDEPENDENT BASIS FOR THE DECISION BELOW, BECAUSE THAT DECISION IS REPUGNANT TO THE UNITED STATES CONSTITUTION

Appellee's final argument for avoiding federal review is that the decision below rests on Article I, Section 15 of the California Constitution, which reads in pertinent part, "[p]ersons may not . . . be compelled in a criminal case to be a witness against themselves, . . . ." How a criminal defendant's mere request for the appointment of a second counsel compels him to incriminate himself is left unexplained by appellee. Indeed,

if this were the case, then in every criminal trial when a defendant appears without counsel, the court would have to hold in camera hearings to determine whether the defendant wishes to have counsel appointed. Cf. Faretta v. California, 422 U.S. 806 (1975). The supposedly adequate and independent state ground posited by appellee is nonexistent.

But for its misconstrued analogy to Penal Code section 987.9, there is no basis in California law for ex parte hearings on the appointment of counsel. A defense attorney is not a witness, whose identity the defendant may wish to conceal. Here, appellee has chosen to tell this Court co-counsel's name (see appellee's request for extension of time, dated August 19, 1982). Where co-counsel is thus identified to the Court, what possible reason can there be for hiding

the request for his appointment? We submit there is none.

## CONCLUSION

Pretrial appointment of defense counsel is one of the components of a criminal trial about which the public undoubtedly has a vested constitutional right to know. The denial of the public's right of access to this part of a criminal trial proceeding constitutes a clear abridgement of the First Amendment. Nothing that appellee has said can change the challenged ruling in this case, which holds that motions for the appointment of counsel can be made and heard ex parte, with the motion being deemed confidential and not subject to public scrutiny. Such a mandatory closure of the State's courtrooms, absent any justification whatsoever, violates the public's First Amendment rights, as was recently held in the Globe Newspaper

Co. case, supra. We ask that the judgment below be vacated for reconsideration in light of that case, or alternatively, that the matter be set for plenary consideration and full briefing and argument.

DATED: October 8, 1982

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